



Law Council
OF AUSTRALIA

Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018

Senate Community Affairs Legislation Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the Law Institute of Victoria in the preparation of this submission.

Introduction

1. The Law Council welcomes the opportunity to provide this submission to the Senate Community Affairs Legislation Committee (**the Committee**) in relation to its inquiry into the Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018 (**the Bill**).
2. The Bill proposes to introduce the following measures:
 - (a) increase existing newly arrived resident's waiting periods and introduce a newly arrived resident's waiting period for carer allowance, bereavement allowance, widow allowance and parenting payment;
 - (b) increase existing newly arrived resident's waiting periods for farm household allowance;
 - (c) introduce a newly arrived resident's waiting period for family tax benefit; and
 - (d) introduce a newly arrived resident's waiting period for parental leave pay and dad and partner pay.
3. Under the proposed scheme, the waiting period for each of the above payment schemes will be 156 weeks. In the case of some benefits, this is an increase from an existing 104 week waiting period, in others this will be a newly introduced waiting period.
4. The proposed measures contain various exemptions from the prospective waiting periods, including exemptions for humanitarian entrants and their families and exemptions for newly arrived migrants that have experienced a change in circumstances after becoming an Australian resident and are no longer able to support themselves as intended.
5. It is submitted that these are significant changes, with the potential to impact on the financial circumstances of many newly arrived migrants in Australia. With this in mind, the Law Council is concerned with the short timeframe the Committee has been provided in which to consider the Bill, noting that stakeholders have been provided minimal time in which to provide input to the proposed measures.
6. Upon review of the Bill, the Law Council has several concerns with the proposals contained in the Bill. These can be summarised as follows:
 - (a) the consistency between the stated objectives of the Bill and the likely effects of the proposed measures;
 - (b) the compatibility of the proposed measures with a range of human rights obligations; and
 - (c) the impact of the reforms on the newly arrived migrant population.
7. These concerns are discussed in further detail below.

The objectives of the Bill

8. The intent of the Bill as articulated by the Minister for Social Services in his Second Reading Speech is to 'promote financial independence and self-sufficiency for newly arrived migrants'.¹ However, the proposed measures could also be viewed as an attempt to find budget savings at the expense of newly arrived migrants and may in fact serve to impose increased hardship and foster exclusion in the community.
9. In acknowledging that the proposed measures attempt to balance responsible economic management and fairness, the rationale for the proposed measures as stated in the Explanatory Memorandum is:

*Budget repair and a return to surplus remain a key priority for the Australian Government to ensure continued economic growth in Australia. In this context, it is important that Australia's welfare payments system provides the best possible encouragement for people to support themselves where they are able so that the system remains sustainable into the future.*²

10. While budgetary constraints and financial sustainability are valid rationales for changes to policy, the Law Council is concerned with the arbitrary targeting of new migrants under these proposals without clear guidance as to how these measures will address a pressing or substantial concern. This view is exacerbated by the lack of evidence accompanying the Bill to suggest that there is an over-reliance on social security by those that will be subject to the proposed reforms. On the contrary, the Law Council submits that Australia's migration program under existing policies produces substantial benefits to the Australian economy, as numerous reports have demonstrated.³
11. It is submitted that the broad intent of social security is to ensure people receive adequate protection when there is a need for such assistance, and is a system predicated on need. These same concerns apply to newly arrived migrants.
12. It is therefore a very significant proposal to increase the inaccessibility of social security for a cohort of the population. Despite the stated goal of encouraging self-sufficiency, it is submitted that the proposed measures unnecessarily disadvantage new migrants and have the potential to undermine their ability to integrate into the Australian community.
13. In light of these significant implications, it is submitted that such measures must be accompanied by a sound policy rationale beyond budgetary savings. This justification should articulate the pressing or substantial concern that is being addressed by the proposals, together with an adequate assessment of whether the measures are reasonable and proportionate measure in addressing this concern.

¹ Second Reading Speech to the Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018 (15 February 2018).

² Explanatory Memorandum to the Social Services Legislation Amendment (Encouraging Self-sufficiency for Newly Arrived Migrants) Bill 2018, 27.

³ See eg, Wright et al, 'Economic migration and Australia in the 21st century', Lowy Institute for International Policy (October 2016), available at <www.lowyinstitute.org/sites/default/files/wright_et_al_economic_migration_and_australia_in_the_21st_century_0_0.pdf>, Australian Government Productivity Commission, 'Migrant Intake into Australia' Productivity Commission Inquiry Report No. 77 (13 April 2016), available at <www.pc.gov.au/inquiries/completed/migrant-intake#report>, and The Migration Council of Australia, 'The Economic Impact of Migration' (2015), available at <http://migrationcouncil.org.au/wp-content/uploads/2016/06/2015_EIOM.pdf>.

14. It is submitted that in the absence of further information justifying the proposed measures, and in light of the substantial benefits of the current migration program to Australia's economy, the proposed changes as contained in the Bill are neither necessary nor appropriate.

Human rights concerns

15. The Law Council notes that the Parliamentary Joint Committee on Human Rights (**PJCHR**) considered the Bill in its report of 27 March 2018⁴ and has sought additional information from the Minister as to how the proposed measures align with Australia's human rights obligations.
16. The Law Council looks forward to reviewing the Minister's response to the requests put forward by the PJCHR in relation to the following observations.

Right to social security

17. In scrutinising the Bill, the PJCHR gave consideration to the proposed measures in the context of the right to social security, as set out in the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.⁵ In particular, the PJCHR noted Australia's obligation to progressively realise this right, and its corresponding duty to refrain from taking retrogressive measures.⁶ The PJCHR continued by stating:

*Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective.*⁷

18. By extending the waiting period for certain welfare payments to newly arrived migrants for an additional year, the proposed measures as contained in the Bill represent a further limitation on the right to social security.
19. While budgetary constraints and financial sustainability are the apparent policy justifications for a reduction in social welfare payments under the proposed scheme, the PJCHR noted that there has been limited information provided which justifies this as a pressing or substantial concern.⁸
20. In relation to proportionality, the PJCHR acknowledged that while there are some exemptions to the proposed limitations based on hardship, the increase in waiting periods under the scheme will still represent a considerable reduction in the availability of social security. The PJCHR has therefore requested further information about any consideration of alternatives to reducing access to social security, in the context of Australia's use of its maximum available resources.⁹

⁴ Parliamentary Joint Committee on Human Rights 'Human rights scrutiny report: Report 3 of 2018' (27 March 2018).

⁵ See ICESCR, article 9.

⁶ Parliamentary Joint Committee on Human Rights 'Human rights scrutiny report: Report 3 of 2018' (27 March 2018), 71.

⁷ Ibid.

⁸ Ibid, 72.

⁹ Ibid, 73-4.

Right to parental leave

21. The PJCHR has also considered the Bill's compatibility with the right to maternity leave as contained in the ICESCR¹⁰ and Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**).¹¹
22. As noted above in relation to the Bill's compatibility with the right to social security, the effect of the proposed measures in extending the waiting period for access to paid parental leave for newly arrived migrants has been identified as representing a retrogressive measure, a type of limitation for the purposes of international human rights law and as such must only occur when it is addressing a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.
23. Again, the PJCHR has requested further information from the Minister as to the compatibility of the proposed measures with the right to paid parental leave in order to satisfy the above threshold for permissible limitations.

Right to equality and non-discrimination

24. Finally, the PJCHR raised concerns with the Bill's compatibility with the right to equality and non-discrimination as contained in the International Covenant on Civil and Political Rights (**ICCPR**)¹² in addition to the general non-discrimination provisions of CEDAW.¹³
25. In this regard, the PJCHR expressed concern that the effect of the proposed measures in further limiting paid parental leave amounts to indirect discrimination due to the disproportionate negative effect on women who are newly arrived migrants.
26. In noting that differential treatment will not constitute unlawful discrimination if based on reasonable and objective criteria such that it serves a legitimate objective, is effective to achieve that legitimate objective and is a proportionate means of achieving that objective, the PJCHR again pointed out that there is limited information on how the proposed measures are addressing a pressing or substantial concern. Further, the PJCHR noted that there has been no information provided as to whether the measure is the least rights-restrictive approach.
27. Again, the PJCHR has requested further information from the Minister as to the compatibility of the proposed measures with the right to equality and non-discrimination in order to satisfy the above threshold for permissible limitations.

Impact on the newly arrived migrant population

28. It is submitted that newly arrived migrants are often more vulnerable to significant and unexpected adversity than those more established in the Australian community, who may have family, familiarity, extended employment, and other support networks. In this regard, changes to policies that are intended to act as a safety net can have greater impact on newly arrived migrants, and should only be agreed upon with a clear understanding of the likely practical effects.

¹⁰ See ICESCR, article 10.2.

¹¹ See CEDAW, article 11(2)(b).

¹² See ICCPR, articles 2 and 26.

¹³ See CEDAW, articles 1, 2, 3, 4 & 15.

29. The Law Council is aware of a number of submissions made by a range of migrant support services and welfare providers that have put forward their views as to the practical impacts of this Bill on the newly arrived migrant population. These submissions have highlighted the particular vulnerabilities of the new migrant population, and the strain these proposed measures are likely place on alternative support networks.
30. The Law Council strongly encourages the Committee to actively engage with this sector of civil society in order to gain a sound appreciation for the likely effects of these measures, including the hardship these reforms may create for a population that is already often marginalised and vulnerable.